YAYASAN MELAKA

v.

PHOTRAN CORPORATION SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-1054-2003]
7 NOVEMBER 2006

CIVIL PROCEDURE: *Summary judgment - Loan - Claim for - Appeal against - Coercion and undue influence - Allegations of - Whether second defendant showed consent to agreement caused by coercion - Contracts Act 1950, s. 15 - Whether alleged undue influence caused to first defendant irrelevant to second defendant - Contracts Act 1950, s. 19 - Whether defence mere bare allegations - Whether unfounded and could not stand in law - Whether plainly contrary to contemporary documentary evidence - Triable issues - Whether raised*

CONTRACT: *Loan agreement - Breach of - Debt - Claim for - Defence of coercion and undue influence - Whether proved - Whether second defendant showed consent to agreement caused by coercion - Contracts Act 1950, s. 15 - Whether alleged undue influence caused to first defendant irrelevant to second defendant - Contracts Act 1950, s. 19 - Whether defence mere bare allegations - Whether unfounded and could not stand in law - Whether plainly contrary to contemporary documentary evidence - Triable issues - Whether raised*

The plaintiffs' claim against the defendants was for the amount of RM9.2 million arising out of a loan agreement entered into between the plaintiff and the first defendant. The second defendant had agreed to carry out the first defendant's obligations as if he were the principal borrower if the first defendant failed to fulfill its obligations under the agreement. The first defendant failed to settle the debt within the time stipulated in the agreement. On 17 March 2003, the plaintiff through its solicitors sent a notice of demand for the said amount. The defendants failed to pay and the plaintiff filed this claim against the defendants. A judgment in default had been obtained against the first defendant. The plaintiff filed an O. 14 application against the second defendant and subsequently an application to strike out the second defendant's counterclaim. The senior assistant registrar allowed the O. 14 application while the deputy registrar subsequently granted the

A plaintiff's application to strike out the second defendant's counterclaim. The second defendant appealed against the aforesaid orders. The second defendant in his defence said that the first defendant was induced and coerced into entering the loan agreement by illegitimate pressure brought to bear upon it by the B plaintiff. The second defendant was likewise coerced into providing the security required by the plaintiff. The facts were that the first defendant had invited the Melaka State Government and Zeron Sdn Bhd to sign an MOU. By this MOU, the parties agreed to establish a joint venture company. The plaintiff entered into the C MOU on behalf of the state government. The parties in the MOU entered into a shareholder's agreement where one Bryn Lloyd Williams, one of the defendant's directors, agreed to allot 8 million ordinary shares, where 1,600,000 (20%) were held by the plaintiff. In consideration of the allotment of shares, the plaintiff undertook D to obtain financing for the company, including an irrevocable letter of credit to enable it to purchase machinery to set up a plant to manufacture the products in Malaysia. According to the second defendant, besides the shareholding, the majority in number of the directors were nominated by and represented by the plaintiff. The E second defendant further said that he was coerced to enter into signing the letter of indemnity. The second defendant had attempted to show certain alleged commitments or agreements before the execution of the loan agreement and indemnity agreement and relied on those prior events to show that these F were triable issues.

Held (dismissing the second defendant's appeals against the decision of the senior assistant registrar and deputy registrar respectively in encls. 30 and 31 with costs to plaintiff):

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(1) The second defendant had not averred that it was unaware of the judgment in default or that he had as directors of first defendant insisted that the suit against the first defendant should be defended. The quorum to transact the business of first defendant must include either second defendant or Bryn H Lloyd William. The suggestion that the plaintiff had with its 70% majority in first defendant deliberately allowed the JID thereby preventing first defendant from raising this issue was unfounded. The second defendant never raised any of the issues until some seven years after the agreement and I indemnity had been signed. As far as the loan agreement was

concerned, the plaintiff had obtained judgment in default against the first defendant on 12 August 2003. Until that judgment is set aside that judgment was good as against the first defendant and no issue of undue influence or coercion or even want of consideration should be entertained in respect of the loan agreement. These issues were *res judicata* between the plaintiff and the first defendant under that judgment. (para 9)

(2) On the alleged coercion caused to the first and second defendants, the pleadings and affidavit did not make any accusation of the committing or threatening to commit any act forbidden by the Penal Code as required in *Perlis Plantation Bhd v. Mohammad Abdullah Ang*. For duress to amount to a defence, the second defendant must show that his consent to the agreement was caused by coercion as defined under s. 15 of the Contracts Act 1950. The second defendant must show that his consent was induced by pressure exercised upon him which was unlawful. Mere bare allegations of coercion was insufficient. The second defendant must condescend to particulars in his defence and affidavit filed in opposition to the summary judgment. It was sufficient for this court to reject it as a triable issue taken with the incontrovertible facts in the affidavit together with the other probabilities discussed herein. (para 14)

(3) The defence and counterclaim premised on the alleged coercion and undue influence caused to the first defendant was irrelevant to the second defendant because s. 19 of the Contracts Act 1950 expressly provides that the contracts were 'voidable at the option of the party whose consent was so caused,' that was, the first defendant. The second defendant could not, in law, avoid the contracts on the basis of the alleged coercion and undue influence caused to the first defendant. (para 15)

(4) The allegations were most untenable and unlikely having regard to the fact that the second defendant, an advocate and solicitor of the High Court of Malaya, was certainly no vulnerable lay person who could have been hoodwinked into entering into an unconscionable bargain. The second defendant himself signed the loan agreement in his position as director of the first defendant. It was the first defendant,

through the second defendant and Bryn who had approached the plaintiff for financial assistance for the loan sum of RM9.2 million. Further it was the second defendant and Bryn who had persuaded the plaintiff to provide the loan to the first defendant. (para 16)

(5) The preparation, finalisation and execution of the loan agreement and indemnity and the terms therein contained was carried out under the direct supervision of the second defendant. Loan agreement and indemnity agreement were both signed before an advocate and solicitor on 26 July 1997 with second defendant for the company and himself in the indemnity agreement. The second defendant had the benefit of further legal advice. After the letter of demand was made on 17 March 2003 to the first defendant and second defendant, the second defendant did not even bother to reply to the letter of demand at the first opportunity available. It was raised by the second defendant only in his defence some seven years after execution of those contemporaneous documents. It must be noted that at the time the loan and indemnity agreements were executed, the plaintiff had only 20% shareholding in the first defendant. Certainly the second defendant's allegation of coercion could not stand in law. (para 18)

(6) Stripped of all the issues that the second defendant had sought to bring, this was a straight forward case involving a loan. Second defendant's affidavit merely relied on the defence pleaded which were bare allegations. When an assertion was equivocal or lacking in precision or was inconsistent with undisputed contemporaneous documents or inherently improbable, this court has a duty to reject it thereby rendering the issue not triable. This court did not see that coercion or undue influence had anything to do with second defendant's decision to sign the loan agreement or the indemnity agreement. This defence was unfounded and rejected. (para 19)

(7) Where the affidavit evidence disclosed a dispute of facts, such facts must be analysed and if they were found to be inconsistent with undisputed contemporaneous documents or inherently improbable in themselves, the court was entitled to

reject those facts and proceed upon the undisputed contemporaneous documentary evidence. The allegations of coercion and undue influence by second defendant were clearly unsubstantiated and plainly contrary to contemporary documentary evidence. (para 20)

(8) The second defendant's counterclaim, which was premised on the same ground that the first defendant was induced and coerced to enter into the loan agreement by illegitimate pressure, induced to enter into the loan agreement by undue influence and that the second defendant was coerced into issuing the indemnity agreement, was clearly an afterthought and for a collateral purpose after the plaintiff had commenced the present action to enforce the loan and indemnity agreements. If the allegations of the second defendant of the events were true, the second defendant should have commenced an action immediately to annul the loan agreement and the indemnity agreement and not waited until the plaintiff had commenced the present proceedings. The issues raised by the second defendant could easily be resolved by looking at the relevant clauses of the loan agreement and the indemnity agreement. It was a plain and obvious case that the counterclaim had no chance of success. To argue the same issues based on the same documents, same set of facts and law at a trial would be a pure waste of judicial time. (para 21)

Case(s) referred to:

Bank Kerjasama Rakyat Malaysia Bhd v. Tetuan Haranay, Roni & Anikah [1999] 1 CLJ 569 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Hoper v. RCA Photophone of Australia Pty Ltd [1937] 59 CLR 348 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd [1996] 1 CLJ 257 CA ***(refd)***

Perlis Plantation Bhd v. Mohammad Abdullah Ang [1988] 1 CLJ 670; [1988] 2 CLJ 134 HC ***(refd)***

Threshing Machine Co v. Mitten [1919] 49 DLR 31 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 14, 15, 19
Evidence Act 1950, ss. 91, 92
Rules of the High Court 1980, O. 14, O. 18 r. 19

A *For the plaintiff - Ben Chan; M/s Lee Hishamuddin Allen & Gledhill*
For the defendant - Raja Aziz Addruse (Philip Choong with him); M/s Philip Choong & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Abdul Wahab Said J:

C **[1]** The plaintiff's claim against the defendants is for the amount of RM9.2 million arising out of a loan agreement dated 26 June 1997 entered into between the plaintiff and the 1st defendant, where the plaintiff granted a loan of RM9.2 million, free of interest.

D **[2]** The loan was payable in 24 months. The 1st defendant is deemed to have breached the agreement if among others, it fails or defaults in payment of any amount payable on the maturity date as provided for under the agreement, regardless of whether the plaintiff had made a formal claim on it or not. The 2nd
E defendant had agreed to carry out the 1st defendant's obligations as if he were the principal borrower if the 1st defendant failed to fulfill its obligations under the agreement.

[3] The 1st defendant failed to settle the debt within the time
F stipulated in the agreement. On 17 March 2003, the plaintiff through its solicitors sent a notice of demand for the said amount. The defendants failed to pay and the plaintiff filed this claim against the defendants.

[4] A judgment in default had been obtained against the 1st
G defendant. The plaintiff filed an O. 14 application against the 2nd defendant in encl. 15 and subsequently an application to strike out the 2nd defendant's counterclaim under O. 18 in encl. 16. The senior assistant registrar allowed the O. 14 application while the deputy registrar subsequently granted the plaintiff's application
H to strike out the 2nd defendant's counterclaim. Both the appeal against the aforesaid orders by the 2nd defendant was argued together before me.

I

[5] The 2nd defendant in his defence said that the 1st defendant was induced and coerced into entering the loan agreement dated 26 June 1997 by illegitimate pressure brought to bear upon it by the plaintiff. The 2nd defendant was likewise coerced into providing the security required by the plaintiff.

[6] The parties' relationship dated back to 1994, where the 1st defendant invited the Melaka State Government and Zeron Sdn Bhd to sign an MOU. By this MOU, the parties agreed to establish a joint venture company which would manufacture high performance optical and electrically conducive film coated products. The plaintiff entered into the MOU on behalf of the State Government. The parties in the MOU entered into a shareholder's agreement where one Bryn Lloyd Williams, who is one of the 1st defendant's directors, agreed to allot 8 million ordinary shares, where 1,600,000 (20%) are held by the plaintiff, 4,000,000 (50%) by Zeron and 2,400,000 (30%) by Bryn Williams and the defendant. In consideration of the allotment of shares, the plaintiff undertook to obtain financing for the company, including an irrevocable letter of credit to enable it to purchase machinery for Photran USA to set up a plant to manufacture the products in Malaysia.

[7] Besides the shareholding, the 2nd defendant said, the majority in number of the directors were nominated by and represented by the plaintiff. The 2nd defendant said that he was coerced to enter into signing the letter of indemnity because he needed the plaintiff to release RM4.6 million to be utilized for the purchase of the said machinery. Besides insisting that its part of the obligation under the shareholders' agreement is to be treated as a loan, totaling RM9.2 million, the plaintiff had also refused to fulfill its obligation under a land transfer agreement, which was in consideration of the transfer of Zecon's 10 million shares to it. The refusal had made it difficult for the 2nd defendant to secure the needed banking facilities.

[8] Having heard submissions from both sides, I find that the defendant's allegation that there was undue influence and coercion is equivocal and inconsistent with undisputed contemporaneous documents, namely the loan agreement and the indemnity agreement. The 2nd defendant had attempted to show certain alleged commitments or agreements before the execution of the

loan agreement and indemnity agreement. He relied on those prior events to show that these are triable issues. Such allegations can be resolved by looking at both the contemporaneous agreements.

[9] The 2nd defendant had not averred that it was unaware of the judgment in default or that he had as directors of 1st defendant together with his brother in-law insisted that the suit against 1st defendant should be defended. The quorum to transact the business of 1st defendant must include either 2nd defendant or Bryn Lloyd William. The suggestion that the plaintiff had with its 70% majority in 1st defendant deliberately allowed the JID thereby preventing 1st defendant from raising this issue is unfounded. The 2nd defendant never raised any of the issues until some seven years after the agreement and indemnity had been signed. As far as the loan agreement is concerned, the plaintiff had obtained judgment in default against the 1st defendant on 12 August 2003. Until that judgment is set aside that judgment is good as against the 1st defendant and no issue of undue influence or coercion or even want of consideration should be entertained in respect of the loan agreement. These issues are *res judicata* between the plaintiff and 1st defendant under that judgment.

[10] The land transfer agreement is a separate transaction between the plaintiff and the defendant and it does not form part of the loan agreement and/or the letter of indemnity. To date no separate qualified title had been issued by the land office in respect of the land transfer agreement. It is governed under the agreement itself and may perhaps be brought as a counter claim but not to defeat the plaintiff's claim.

[11] Furthermore, there is an entire agreement clause in both the agreements. For the sake of clarity, I reproduce the relevant provisions:

Part 13, Section 13, Loan Agreement:

> This Agreement (together with any documents referred to herein and inclusive of the Schedules mentioned herein) between the parties hereto and it supersedes any prior commitment and agreement whether oral or in writing and it is hereby expressly declared that no variations thereof shall be effective unless made in writing by the parties hereto.

Clause 7, Indemnity Agreement:

> 1 (the 2nd Defendant) confirmed that his Agreement (together with any document referred to herein and inclusive of the schedules attached herein) constitutes the whole Agreement between the parties hereto and it supersedes any prior commitment and agreement whether verbal or in writing and it is hereby expressly declared that no variations hereof shall be effective unless made in writing by the parties hereto and it also supersedes any previous commitment and agreement whether verbal or in writing that involves us.

[12] The effect of the entire agreement clause is that the defendants would not be able to bring any evidence outside the four corners of both the agreements to prove coercion and undue influence. This would also exclude the understandings in the shareholders agreement. This however does not preclude the 2nd defendant from bringing in evidence of coercion and undue influence to vitiate the agreements which will be dealt with later.

[13] It is settled law that where a contract expressly contains a "whole agreement clause", it is not competent for the court to import extrinsic evidence to contradict the clear terms. The Australian highest court of appeal in *Hoper v. RCA Photophone of Australia Pty Ltd* [1937] 59 CLR 348 at p 366 has adopted the following passage from the Canadian case of *Threshing Machine Co v. Mitten* [1919] 49 DLR 31: "The written contract declares in explicit words that the terms of the agreement are to be found in the writing and in the writing exclusively. In face of this provision, it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument." Further, the temptation of looking outside the contract under the exceptions in ss. 91 and 92 of the Evidence Act 1950 ought to be resisted. See *Bank Kerjasama Rakyat Malaysia Berhad v. Tetuan Haranay, Roni & Anikah* [1999] 1 CLJ 569 at pp 573.

[14] On the alleged coercion caused to the 1st and 2nd defendants, the pleadings and affidavit do not make any accusation of the committing or threatening to commit any act forbidden by the Penal Code as required in *Perlis Plantation Bhd v. Mohammad Abdullah Ang* [1988] 1 CLJ 670; [1988] 2 CLJ (Rep) 134. There the court rejected the issue raised by the defendant that the agreement in question was void and of no effect by reason of coercion. Learned counsel for 2nd defendant before me submitted at length on economic Duress. For Duress to amount to a defence, the 2nd defendant must show that his consent to the agreement was caused by coercion as defined under s. 15 of the Contracts Act. Section 15 defines coercion as the committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. The English Common Law on economic duress is therefore not applicable under our Contracts Act. The 2nd defendant must show that his consent was induced by pressure exercised upon him which is unlawful. Consent to an agreement is said to be free when it is not caused by either coercion, undue influence fraud, misrepresentation or mistake and this excludes economic duress (see s. 14 Contracts Act 1950). Mere bare allegations of coercion is insufficient. The 2nd defendant must condescend to particulars in his defence and affidavit filed in opposition to the summary judgment. Pertinently I have to consider whether after entering the contract, the 2nd defendant had taken steps to avoid it. The 1st defendant had not taken steps to avoid it. The 1st step he took was in his defence. This by itself is sufficient for me to reject it as a triable issue taken with the incontrovertible facts in the affidavit together with the other probabilities discussed herein.

[15] The defence and the counterclaim premised on the alleged coercion and undue influence caused to the 1st defendant is irrelevant to the 2nd Defendant because s. 19 of the Contracts Act 1950 expressly provides that the contracts are "voidable at the option of the party whose consent was so caused", that is, the 1st defendant. The 2nd defendant cannot, in law, avoid the contracts on the basis of the alleged coercion and undue influence caused to the 1st defendant.

[16] The allegations are most untenable and unlikely having regard to the fact that the 2nd defendant, an advocate and solicitor of the High Court of Malaya, is certainly no vulnerable lay person who could have been hoodwinked into entering into an unconscionable bargain. The 2nd defendant himself signed the loan agreement in his position as director of the 1st defendant. It was the 1st defendant, through the 2nd defendant and Bryn who had approached the plaintiff for financial assistance for the loan sum of RM9.2 million. Further, it was the 2nd defendant and Bryn who had persuaded the plaintiff to provide the loan to the 1st defendant. In *Pengiran Othman Shah bin Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd)* [1996] 1 CLJ 257, the Court of Appeal upheld the striking out the defence under O. 18 r. 19 where the appellant defendant had raised the issue that they were induced by undue influence in executing several agreements. In finding that the arguments on undue influence failed, YA Siti Norma Yaakob JCA (as she then was) supported her finding by stating that the appellants were legally represented and he must go one step further to prove that the other party has used that position to obtain an unfair advantage over him.

[17] The terms of the loan agreement are very favourable to the 1st defendant. The 1st defendant was only required to pay the total interest free loan sum of RM9.2 million within 24 months from date of release of the balance loan of RM4.6 million from 26 June 1997. Indisputably, the 1st defendant benefited from the favorable terms of repayment of the interest free loan.

[18] The preparation, finalization and execution of the loan agreement and indemnity and the terms therein contained was carried out under the direct supervision of 2nd defendant. Loan agreement and the indemnity agreement were both signed before Mohamad Jailani bin Khamis, also an advocate & solicitor on 26 July 1997 with 2nd defendant for the company and himself in the indemnity agreement. In other words, 2nd defendant had the benefit of further legal advice. After the letter of demand was made on 17 Mac 2003 to 1st defendant and 2nd defendant, the 2nd defendant did not even bother to reply to the letter of demand at the first opportunity available. It was raised by 2nd defendant only in his defence on 28 October 2003 some seven years after execution of those contemporaneous documents. It

must be noted that at the time the loan and indemnity agreements were executed, the plaintiff only had 20% shareholding in the 1st defendant. Certainly, the 2nd defendant's allegation of coercion cannot stand in law.

[19] The fact remains that stripped of all the issues that the 2nd defendant has sought to bring, this is a straight forward case involving a loan. 2nd defendant affidavit merely relied on the defence pleaded which are bare allegation. When an assertion is equivocal or lacking in precision or is inconsistent with undisputed contemporaneous documents or inherently improbable, this court has a duty to reject it thereby rendering the issue not triable (see *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14). I do not see that coercion or undue influence has anything to do with 2nd defendant decision to sign the loan agreement of the indemnity agreement. This defence is unfounded and rejected.

[20] In a striking out application, the principle is trite that whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporaneous documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence. The allegations of coercion and undue influence by 2nd defendant are clearly unsubstantiated and plainly contrary to contemporary documentary evidence.

[21] The 2nd defendant's counterclaim is premised on the same ground that the 1st defendant was induced and coerced to enter into the loan agreement by illegitimate pressure, induced to enter into the loan agreement by undue influence, and that the 2nd defendant was coerced into issuing the indemnity agreement. The counterclaim is clearly an afterthought and for a collateral purpose after the plaintiff has commenced the present action to enforce the loan and indemnity agreements. If the allegations of the 2nd defendant of the events occurring in 1997 were true, the 2nd

defendant should have commenced an action immediately to annul the loan agreement and the indemnity agreement and not waited until the plaintiff has commenced the present proceedings.

[22] The issues raised by the 2nd defendant could easily be resolved by looking at the relevant clauses of the loan agreement and indemnity agreement. It is a plain and obvious case that the counterclaim has no chance of success. To argue the same issue based on the same documents, same set of facts and law at a trial would be a pure waste of judicial time.

[23] By virtue of the above reason, I dismissed the 2nd defendant's appeals against the decision of the senior assistant registrar and deputy registrar respectively in encls. 30 and 31 with costs to plaintiff.